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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES, PETITIONER,

vs.

MILTON E. GETZ

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1931

CERTIORARI GRANTED JANUARY 11, 1932

(36,342)

( )

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Printed, Washington, D. C., November 11, 1931



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[fol. 1] [File endorsement omitted]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, DEPT. No. 14

No. 164,461

PEIRCE COOMBES, Plaintiff,

vs.

M. G. FRANKLIN, MILTON E. GETZ, M. O. MEYER, and S. O. MEYER, Defendants

SECOND AMENDED COMPLAINT—Filed July 20, 1926

Comes now the plaintiff in the above-entitled action and by leave of Court first had and obtained files this his second amended complaint, and for cause of action against defendants and each of them complains and alleges:

I

That at all times hereinafter mentioned Getz Bros., & Company was, and it now is, a corporation duly organized and existing under and by virtue of the laws of the State [fol. 2] of California and having its principal place of business in the City and County of San Francisco.

II

That at all times herein mentioned John Demartini Company was, and now is, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco.

III

That within two (2) years last past said Ge os., & Company became indebted in the sum of six hu d and seventeen dollars and fifty cents ($617.50) on an open and current account to John Demartini Company for goods sold and delivered by John Demartini Company to Getz Bros.,

& Company at their special instance and request, no part of which sum has been paid, and the whole thereof is now due, owing and unpaid from Getz Bros., & Company to John Demartini Company; that the last of said goods were sold and delivered by John Demartini Company to Getz Bros., & Company on January 22, 1924.

[fol. 3]

IV

That said sum of six hundred and seventeen dollars and fifty cents ($617.50) was the agreed price to be paid by Getz Bros., & Company to John Demartini Company for the goods sold and delivered as above alleged; that said sum was and is the reasonable value of the said goods so sold and delivered.

V

That thereafter, to-wit, on or about August 21, 1925, and for a valuable consideration, said John Demartini Company sold, assigned and transferred to plaintiff its said claim and cause of action against Getz Bros., & Company for said goods sold and delivered as aforesaid by John Demartini Company to Getz Bros., & Company, and the plaintiff ever since has been, and now is, the owner and holder thereof.

VI

That plaintiff is informed and believes and therefore alleges the fact to be that at all times herein mentioned up to and including the 28th day of February, 1923, the defendants and one R. A. May were the directors of said Getz Bros., & Company, a corporation.

[fol. 4]

VII

That at all times herein mentioned and prior to the 21st day of June, 1922, the defendant M. G. Franklin was a director and the treasurer of Getz Bros., & Company and general manager of the export business of Getz Bros., & Company, and as such general manager of said export business had sole and complete charge of the purchases by Getz Bros., & Company, from one A. C. Rulofson, as hereinafter set forth.

VIII

(a) The plaintiff is informed and believes, and therefore alleges the fact to be, that some time in the year 1917, the exact time being unknown to the plaintiff, the defendant M. G. Franklin and one A. C. Rulofson and one Leon Samuels knowingly, unlawfully, fraudulently and wilfully and with the intent to injure and defraud said Getz Bros., & Company and misappropriate its moneys, entered into a secret combination and conspiracy wherein and whereby they planned to and did misappropriate large sums of money from Getz Bros., & Company by illegal and fraudulent means and methods, as hereinafter more particularly set forth, and, in pursuance of said secret combination and conspiracy the said defendant M. G. Franklin, in confedera-
[fol. 5] tion and collusion with said A. C. Rulofson and Leon Samuels, and in the manner and by the means and methods hereinafter set forth during the years 1917 to 1920, both inclusive, knowingly, secretly, illegally, wilfully and fraudulently, and with the intent to injure and defraud said Getz Bros., & Company misappropriated large sums of money of and from Getz Bros., & Company amounting to a sum greatly in excess of five hundred and fifty thousand dollars ($550,000), the exact amount being unknown to the plaintiff, as hereinafter more particularly set forth.

(b) 1. Continuously during all of said time said defendant M. G. Franklin was, as aforesaid, a director and the treasurer of Getz Bros., & Company and general manager of the export business of Getz Bros., & Company, and as such Getz Bros,, & Company and its stockholders reposed great trust and confidence in said M. G. Franklin and continuously, during all of said time the said M. G. Franklin had sole and complete charge of the purchases hereinafter referred to made by Getz Bros., & Company from the said A. C. Rulofson, and the said defendant M. G. Franklin had sole and complete charge of the financing, payments and all other details arising out of the said purchases from the said
[fol. 6] A. C. Rulofson by the said Getz Bros., & Company.

2. Continuously during all of said time said A. C. Rulofson was engaged as a mill agent and broker for the sale of iron and steel products.

3. Continuously during all of said time said Leon Samuels was the confidential advisor, attorney and close friend of said M. G. Franklin, and said Leon Samuels was at all times herein mentioned, and now is an attorney at law duly licensed to practice said profession in all of the Courts of the State of California; that said Leon Samuels did not have during all of the times herein mentioned any knowledge or experience in the sale or export of iron and steel products save and except such knowledge and experience as he may have gained from the transactions hereinabove and hereinafter set forth and described.

4. That said A. C. Rulofson and M. G. Franklin were continuously during all of said time and now are shrewd, intelligent men, thoroughly experienced in the export business with particular reference to iron and steel products, with a complete and accurate knowledge of market prices of iron and steel products in the United States and in the [fol. 7] Orient during all of the times mentioned in this complaint.

5. That the defendant, M. G. Franklin, and said A. C. Rulofson and Leon Samuels, and each of them, well knew that during all of said times herein referred to said Getz Bros., & Company, its directors, stockholders and creditors reposed great trust and confidence in the said M. G. Franklin.

(c) During the said years 1917 to 1920, both inclusive, in pursuance of said secret combination and conspiracy, and as hereinafter more particularly set forth and alleged, the said defendant M. G. Franklin knowingly, illegally, fraudulently and wilfully, and with intent to injure and defraud the said Getz Bros., & Company and misappropriate its moneys, and in confederation and collusion with A. C. Rulofson and Leon Samuels, and while the said M. G. Franklin was manager of the export business of Getz Bros., & Company, a corporation, procured and caused Getz Bros., & Company to buy in certain cases and to pretend to buy in other cases from said A. C. Rulofson from time to time during said period of years, large and varying quantities of steel plates and other steel products and the said M. G. Franklin procured and caused said Getz Bros., & Company, to pay to the said A. C. Rulofson therefore a sum of about

[fol. 8] two million (2,000,000) dollars, the exact amount being unknown to the plaintiff.

(d) That by secret prearrangement and in pursuance of the said secret combination and conspiracy said Franklin, Rulofson and Samuels knowingly, unlawfully, fraudulently and wilfully, and with the intent to injure and defraud said Getz Bros., & Company and misappropriate its moneys, mutually made and executed the agreements and engaged in the transactions and practices hereinafter particularly set forth and alleged in the next following paragraphs first to seventh inclusive, of this complaint, as plaintiff is informed and believes.

First. During the year 1917 and the early part of 1918, said A. C. Rulofson from time to time sold in different quantities and for different prices steel plates and other products to said Getz Bros., & Company through the medium of Defendant M. G. Franklin, who purchased the same on behalf of said Getz Bros., & Company from said Rulofson at reasonable, agreed and current market prices aggregating the total sum of eight hundred and seventy-seven thousand eight hundred and fifty-eight and 10/100 dollars ($877,858.10); that at the time each separate sale of said products was made, said Rulofson by agreement with and [fol. 9] direction of said Franklin and Samuels billed and pretended to sell said products to said Getz Bros., & Company at separate prices in each instance greater than the actual price agreed upon for the sale of said products, and the aggregate of said higher prices for said products was the sum of one million three hundred and seventy-nine thousand eighty-three and 33/100 dollars ($1,379,083.33); that during the year 1917 and the early part of 1918, said Getz Bros., & Company through the medium of the defendant Franklin paid said Rulofson for said products said sum of one million three hundred and seventy-nine thousand eighty-three and 33/100 dollars ($1,379,083.33); that at the time each of said sales was made it was agreed between said Franklin, Rulofson and Samuels that the difference between the true price of said products and the false price at which they were billed to said Getz Bros., & Company, less the agreed and customary brokerage or commission of A. C. Rulofson, should be secretly delivered to said Leon Samuels; that in fact said Rulofson did so deliver said bal-

ance of five hundred and one thousand two hundred and twenty-five and 23/100 dollars ($501,225.23) to said Leon Samuels during the year 1917, and the early part of 1918, less said agreed and customary brokerage or commission of [fol. 10] A. C. Rulofson amounting to a sum not exceeding forty thousand dollars ($40,000), and there was actually so paid to Samuels during the years 1917 and 1918, a sum exceeding four hundred and sixty-thousand dollars ($460,000).

Second. That during the year 1918 said Getz Bros., & Company through the medium of the defendant M. G. Franklin from time to time bought certain products from Brier Hill Steel Company through the medium of its representative A. C. Rulofson for the reasonable and agreed aggregate price of sixty-three thousand nine hundred and twenty and 26/100 dollars ($63,920.26), and said Brier Hill Steel Company billed said product to said Getz Bros., & Company at and for stixty-three thousand nine hundred and twenty and 26/100 dollars ($63,920.26); that by agreement with and direction of said Franklin and Samuels said Rulofson paid said purchase price to his principal, Brier Hill Steel Company, and forthwith billed and pretended to sell said products to Getz Bros., & Company at prices in excess of the true purchase price, to wit at the false and fictitious price of eighty-five thousand two hundred and sixty-four and 6/100 dollars ($85,264.06), and by agreement with and [fol. 11] direction of said Franklin and Samuels said Rulofson paid to said Samuels the difference between the said true price and said false price of said products, namely twenty-one thousand three hundred and forty-three and 80/100 dollars ($21,343.80), less a commission of three thousand three hundred and eight and 42/100 dollars ($3,308.42), or the sum of eighteen thousand and thirty-five and 38/100 dollars ($18,035.38); that said sum of twenty-one thousand three hundred and forty-three and 80/100 dollars ($21,343.80) as paid by Rulofson to Samuels, and the true purchase price of sixty-three thousand nine hundred and twenty and 26/100 dollars ($63,920.26) was paid and delivered to Rulofson by said Getz Bros., & Company through the medium of the defendant Franklin.

Third. That during the year 1919 said Getz Bros., & Company through the medium of defendant Franklin secretly purchased certain products known as bamboo steel from

certain persons, not including A. C. Rulofson, and billed and pretended to sell same to A. C. Rulofson at an agreed price of fifty-four thousand five hundred dollars ($54,500), which Rulofson paid said Getz Bros., & Company; and by agreement with and direction of said Franklin and Samuels said Rulofson immediately thereafter billed back said prod- [fol. 12] ucts to said Getz Bros., & Company for the sum of fifty-nine thousand four hundred dollars ($59,400); and thereupon by agreement with and direction of said Franklin and Samuels he paid to Samuels the difference between the actual price and the fictitious price of said products, to wit four thousand nine hundred dollars ($4,900), less a commission of nine hundred and thirty-three and 33/100 ($933.33) dollars retained by said Rulofson, or three thousand nine hundred and sixty-six and 67/100 dollars ($3,966.67) in all; that said goods were so billed to said Getz Bros., & Company to evidence a pretended sale from Rulofson to said Getz Bros., & Company, when in fact no such sale was made, but such transaction was part of said conspiracy to defraud said Getz Bros., & Company; that in fact said Getz Bros., & Company, through the medium of said Franklin, paid to Rulofson said sum of fifty-nine thousand four hundred dollars ($59,400).

Fourth. That during the year 1920 said Getz. Bros., & Company through the medium of defendant Franklin billed and pretended to sell to A. C. Rulofson certain products for the sum of Fifty-eight thousand one hundred and sixty-three and 46/100 dollars ($58,163.46); that in fact said [fol. 13] Rulofson did not buy or agree to buy said products from said Getz Bros., & Company but before said goods were so billed to him he had already sold said products to other persons with the full knowledge and agreement of said Franklin and Samuels at a sum — four thousand four hundred and eighty-eight and 51/100 dollars ($4,488.51) in excess of said price of fifty-eight thousand one hundred and sixty-three and 46/100 dollars ($58,163.46), at which said products were billed to him as aforesaid, to wit at the price of sixty-two thousand six hundred and fifty-one and 97/100 dollars ($62,651.97); that by agreement and direction of said Franklin and Samuels said Rulofson paid to said Samuels said sum of four thousand four hundred and eighty-eight and 51/100 dollars ($4,488.51), less an

agreed commission of seven hundred and seventy-six and 66/100 dollars ($776.66), retained by him, to wit the sum of three thousand seven hundred and eleven and 85/100 dollars ($3,711.85) in all; that said sum of four thousand four hundred and eighty-eight and 51/100 dollars ($4,488.51) and said sum of fifty-eight thousand one hundred and sixty-three and 46/100 dollars ($58,163.46) were received by Rulofson from the persons to whom he had sold said goods on behalf of Franklin representing said Getz Bros., & [fol. 14] Company as aforesaid, and at the same time he paid said sum of fifty-eight thousand one hundred and sixty-three and 46/100 dollars ($58,163.46) to said Getz Bros., & Company.

Fifth. During the years 1919 and 1920 said Getz Bros., & Company through the medium of said Franklin purchased from a certain firm other than said Rulofson certain products at and for the reasonable and agreed price of two hundred and thirty-two thousand seven hundred and twenty-three and 31/100 dollars ($232,723.31); that said goods were billed to said Getz Bros., & Company at this price and immediately thereafter by agreement and direction of said Franklin and Samuels said Rulofson billed and pretended to sell said products to said Getz Bros., & Company for the false and fictitious price of two hundred and ninety-six thousand seven hundred and seventy-two and 9/100 dollars ($296,772.09), and such false and fictitious price was paid to Rulofson by said Getz Bros., & Company through the medium of defendant Franklin, and out of this sum the seller to said Getz Bros., & Company was paid two hundred and thirty-two thousand seven hundred and twenty-three and 31/100 dollars ($232,723.31) through the medium of defendant Franklin.

[fol. 15] Thereupon by agreement with and direction of said Franklin and Samuels said Rulofson paid Samuels the difference between the actual price and the fictitious price of said products, to-wit sixty-four thousand and forty-eight and 78/100 dollars ($64,048.78), less a commission of not more than four thousand dollars ($4,000) retained by Rulofson, or over sixty thousand dollars ($60,000) in all; that said goods were so billed to said Getz Bros., & Company to evidence a pretended sale from Rulofson to said Getz Bros., & Company, when in fact no such sale

was made, but such transaction was part of said conspiracy to defraud said Getz Bros., & Company.

Sixth. During the year 1920 said Getz Bros., & Company through the medium of said Franklin purchased from a certain firm other than Rulofson certain products at and for the reasonable and agreed price of one hundred and seventy-eight thousand four hundred and eighty-five and 15/100 dollars ($178,485.15); that said goods at the direction of said defendant Franklin were billed by the seller to said Rulofson at this price, which price Rulofson paid seller; that in fact Rulofson did not buy or agree to buy said products from seller, and immediately thereafter by agreement and direction of said Franklin and Samuels said [fol. 16] Rulofson billed and pretended to sell said products to said Getz Bros., & Company at the false and fictitious price of one hundred and eighty-nine thousand six hundred and ten and 41/100 dollars ($189,610.41) and such false and fictitious price was paid to Rulofson by said Getz Bros., & Company through the medium of defendant Franklin.

Thereupon by agreement with and direction of said Franklin and Samuels said Rulofson paid to Samuels the difference between the actual price and the fictitious price of said products, to-wit eleven thousand one hundred and twenty-five and 26/100 dollars ($11,125.26), less a commission of two thousand one hundred and forty-six and 2/100 dollars ($2,146.02) retained by said Rulofson, or eight thousand nine hundred and seventy-nine and 24/100 dollars ($8,979.24) in all; that said goods were so billed to said Getz Bros., & Company to evidence a pretended sale from Rulofson to said Getz Bros., & Company, when in fact no such sale was made, but such transaction was part of said conspiracy to defraud said Getz Bros., & Company.

Seventh. During the year 1920, said Getz Bros., & Com- [fol. 17] pany through the medium of said Franklin purchased from a certain firm certain products at and for the reasonable and agreed price of thirty-eight thousand nine hundred and forty-nine and 43/100 dollars ($38,949.43); that said goods at the direction of defendant Franklin were billed by the seller to said Rulofson at this price, and

which price Rulofson paid seller; that in fact said Rulofson did not buy or agree to buy said products from the seller but before the said goods were so billed to him he had already sold said products to other persons with full knowledge and agreement of said Franklin and Samuels at the price of forty-two thousand three hundred and seventeen and 31/100 dollars ($42,317.31), and such price was paid to Rulofson by the buyer.

Thereupon by agreement with and direction of said Franklin and Samuels, said Rulofson paid to Samuels the difference between the actual price and the sale price of said products, to-wit three thousand three hundred and sixty-eight and 88/100 dollars ($3,368.88), less a commission of four hundred and forty-eight and 99/100 dollars ($448.99) retained by said Rulofson, or two thousand nine hundred and nineteen and 89/100 dollars ($2,919.89) in all, and that such transaction was part of said conspiracy to defraud said Getz Bros., & Company.

[fol. 18] (e) That so far as plaintiff is advised, informed and believes the said Leon Samuels performed no services of any kind or character to justify, earn or deserve the payment of any commission on account of said sales, and in this regard plaintiff further alleges that he is informed and believes and alleges the fact to be that all of said payments made by the said A. C. Rulofson to the said Leon Samuels as aforesaid, were made in pursuance of said secret combination and conspiracy knowingly, wilfully, fraudulently and unlawfully and with the intent to injure and defraud said Getz Bros., & Company and were fraudulently, dishonestly and collusively made with the full knowledge, acquiescence and participation of the defendant M. G. Franklin and were further made to misappropriate the moneys of said Getz Bros., & Company and were also further made to charge and burden said Getz Bros., & Company with false and excessive charges so that said defendant Franklin in conjunction with his co-conspirators Rulofson and Samuels, could misappropriate the moneys represented thereby.

Plaintiff further avers that he is informed and believes and therefore alleges the fact to be that in pursuance of said secret combination and conspiracy the greater part (the [fol. 19] exact amount being unknown to the plaintiff) of

the said sum of money so paid by said A. C. Rulofson to the said Leon Samuels was delivered and paid over by the said Leon Samuels to the said defendant M. G. Franklin and that the methods adopted by the said Franklin, Rulofson and Samuels, as above set forth, were merely steps in the secret combination and conspiracy knowingly, unlawfully, fraudulently and wilfully engaged in with the intent to injure and defraud said Getz Bros., & Company and intended as, and in fact was, a cunning device and fraudulent scheme for concealing the profits realized by the said Franklin, Rulofson and Samuels and the misappropriations by defendant Franklin and his co-conspirators Rulofson and Samuels.

(f) That all of the facts and events in the foregoing and within paragraph VIII alleged were well known to and participated in and approved by the said M. G. Franklin, A. C. Rulofson and Leon Samuels at the times of their respective occurrences, and so far as plaintiff is informed and believes the said facts and events reflect and represent the means and methods so far as plaintiff has, at this time, been able to ascertain, of carrying out said secret, illegal and fraudulent conspiracy to injure and defraud said Getz [fol. 20] Bros., & Company and to misappropriate its moneys.

IX

On or about June 1st, 1922, a person formerly employed in the Treasury Department of the United States of America and particularly in the Income Tax Department thereof, informed and notified the defendant M. O. Meyer that said Leon Samuels had paid for the year 1917 an income tax of approximately sixty thousand dollars ($60,000) on account of alleged commission purported to have been paid to him by said A. C. Rulofson on sales alleged to have been made by said A. C. Rulofson to Getz Bros., & Company during the said year 1917. Shortly thereafter and prior to September 1st, 1922, the defendant M. O. Meyer repeated the information received as aforesaid to the defendants S. O. Myer and Milton E. Getz who then were acting as directors of Getz Bros., & Company herein and the said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz assumed, without further inquiry on account of the amount

of the said tax reported to have been paid by said Leon Samuels that the alleged commissions paid to said Leon Samuels by said A. C. Rulofson amounted to approximately [fol. 21] one hundred and sixty thousand dollars ($160,000) and thereupon, between June 1st, 1922, and September 1st, 1922, the defendants S. O. Meyer, M. O. Meyer and Milton E. Getz made a demand on said M. G. Franklin, A. C. Rulofson and Leon Samuels for the payment to Getz Bros., & Company of the sum of one hundred thousand dollars ($100,000), the said sum being the difference between the assumed or estimated commissions of one hundred and sixty thousand dollars ($160,000) assumed to have been paid by A. C. Rulofson to Leon Samuels and the said sixty thousand dollars ($60,000) in taxes which were alleged to have been paid to the United States of America by the said Leon Samuels. The plaintiff is informed and believes and therefore alleges the fact to be that said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz, or either or any of them, made no investigation whatsoever with reference to the exact amount of alleged commissions paid by said A. C. Rulofson to said Leon Samuels and that said fact was well known by said M. G. Franklin, Leon Samuels and A. C. Rulofson; and plaintiff further avers that said M. G. Franklin, Leon Samuels and A. C. Rulofson suggested to defendants M. O. Meyer, S. O. Meyer and Milton E. Getz, that said commissions did not exceed the said sum of one [fol. 22] hundred and sixty thousand dollars ($160,000) which plaintiff is informed and believes was untrue and that said M. G. Franklin, Leon Samuels and A. C. Rulofson, and each of them, knew at the time of said suggestion that said amount was untrue, inaccurate and false and that said M. G. Franklin, Leon Samuels and A. C. Rulofson, and each of them, having full and complete and accurate knowledge and belief upon said subject suppressed the truth at the time that said demand was made, as aforesaid, and at the times hereinafter mentioned.

X

(a) That at the time of said demand made as aforesaid by defendants M. O. Meyer, S. O. Meyer and Milton E. Getz, the said Getz Bros., & Company did not know or suspect, nor did the said defendants M. O. Meyer, S. O. Meyer

or Milton E. Getz know or suspect to exist in favor of Getz Bros., & Company and against said M. G. Franklin, A. C. Rulofson and Leon Samuels, claims aggregating in a sum in excess of five hundred and fifty thousand dollars ($550,000) or thereabouts, and had Getz Bros., & Company or said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz or either or any of them known or suspected the exist- [fol. 23] ence of claims in excess of five hundred and fifty thousand dollars ($550,000), or thereabouts, against said M. G. Franklin, A. C. Rulofson and Leon Samuels or either or any of them, demand would have been made upon said M. G. Franklin, A. C. Rulofson and Leon Samuels for the full sum representing said claims and not merely for the sum of one hundred thousand dollars ($100,000), as hereinbefore alleged.

(b) That at the time of said demand said A. C. Rulofson, Leon Samuels and M. G. Franklin wilfully and fraudulently failed to disclose to Getz Bros., & Company or to the said M. O. Meyer, S. O. Meyer and Milton E. Getz., or either or any of them, the total moneys which had been secretly, illegally, fraudulently, knowingly and wilfully misappropriated by them with the intent to injure and defraud Getz Bros., & Company and on the contrary said A. C. Rulofson, Leon Samuels and M. G. Franklin permitted Getz Bros., & Company and defendants M. O. Meyer, S. O. Meyer and Milton E. Getz and each of them, to believe, knowing that said belief was without foundation and contrary to the fact, that only one hundred and sixty thousand dollars ($160,000), or thereabouts, had been misappropriated by said M. G. Franklin in conjunction with his co-conspira- [fol. 24] tors A. C. Rulofson and Leon Samuels, whereas in truth and in fact said persons had misappropriated a sum greatly in excess of five hundred and fifty thousand dollars ($550,000), of which said A. C. Rulofson, Leon Samuels and M. G. Franklin had full, accurate and complete knowledge.

(c) That one or about the first day of September, 1922, the defendants M. O. Meyer, S. O. Meyer and Milton E. Getz purporting to act for and on behalf of Getz Bros., & Company, and in its alleged interests, entered into the form of a written agreement wherein Getz Bros., & Company, as a party of the first part and defendant M. G. Franklin as

the party of the second part, agreed in substance and effect that the defendant M. G. Franklin would pay to Getz Bros., & Company in settlement of its claim against said M. G. Franklin, A. C. Rulofson and Leon Samuels, arising out of the facts hereinbefore alleged, seventy thousand dollars ($70,000) in certain installments, to-wit thirty thousand dollars ($30,000) in cash upon the execution of said agreement in form, ten thousand dollars ($10,000) on or before October 15, 1922, ten thousand dollars ($10,000) on or before November 30, 1922, and twenty thousand dollars ($20,000) on or before January 1, 1923, with interest on de- [fol. 25] ferred payments at the rate of six per cent (6%) per annum until paid. That it was further agreed in said agreement in form that time was of the essence of contract and of such payments, and if and when the same were paid said Getz Bros., & Company as a party of the first part would execute and deliver said M. G. Franklin as the party of the second part a release and discharge releasing and forever discharging said M. G. Franklin and said A. C. Rulofson and said Leon Samuels, and each of them, of and from any and all claims, demands, liabilities, obligations and causes of action of every nature and description, but plaintiff avers that in making said alleged settlement agreement in form defendant M. G. Franklin acted not only on behalf of himself but also as the agent of said A. C. Rulofson and Leon Samuels.

(d) That at the time of said alleged settlement agreement in form said Getz Bros., & Company or the defendants M. O. Meyer, S. O. Meyer or Milton E. Getz, or either or any of them, did not know or suspect to exist in favor of Getz Bros., & Company claims against said M. G. Franklin, Leon Samuels and A. C. Rulofson aggregating in a sum in excess of five hundred and fifty thousand dollars ($550,000), [fol. 26] or thereabouts, and had Getz Bros., & Company or said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz or either or any of them known or suspected the existence of claims in favor of Getz Bros., & Company and against said M. G. Franklin, A. C. Rulofson and Leon Samuels in excess of five hundred and fifty thousand dollars ($550,000) the said knowledge os suspicion would materially have affected the settlement of Getz Bros., & Com-

pany's claims with said A. C. Rulofson, Leon Samuels and M. G. Franklin.

(e) That said alleged settlement in form was unjust, unfair and inequitable in so far as Getz Bros., & Company was concerned because said M. G. Franklin, A. C. Rulofson and Leon Samuels knowingly, willfully and deliberately concealed and suppressed the facts hereinbefore alleged, wherein and whereby it is disclosed that said Leon Samuels, A. C. Rulofson and M. G. Franklin had misappropriated with the intent to injure and defraud Getz Bros., & Company moneys belonging to said Getz Bros., & Company in a sum in excess of five hundred and fifty thousand dollars ($550,000).

(f) At the time said alleged contract in form, dated September 1, 1922, was executed the said Getz Bros., & Company was insolvent with liabilities in excess of five [fol. 27] hundred thousand dollars ($500,000) and assets of less than one hundred and fifty thousand dollars ($150,000).

(g) Plaintiff avers that subsequent to said first day of September, 1922, the defendant M. G. Franklin did not pay the said sum of seventy thousand dollars ($70,000) to Getz Bros., & Company, but plaintiff is informed and believes and therefore alleges the fact to be that said M. G. Franklin paid the sum of fifty thousand dollars ($50,000) to defendant M. O. Meyer and an additional sum of twenty thousand dollars ($20,000) to defendant S. O. Meyer; that all of said payments were fraudulently and secretly made in currency prior to January 1st, 1923, at times and places when no one else was present; that no record or entry was made upon the books of the said Getz Bros., & Company with reference to the said payments, or any part thereof.

(h) Neither of said defendants, to-wit, M. O. Meyer or S. O. Meyer was treasurer of Getz Bros., & Company and in this regard plaintiff avers that the by-laws of said Getz Bros., & Company provide that the treasurer shall be the custodian of all of Getz Bros., & Company's funds.

(i) That said sum of seventy thousand dollars ($70,000) was secretly, illegally, wilfully, knowingly and fraudulently [fol. 28] misappropriated in or about the month of February, 1923, by the defendants M. O. Meyer, S. O. Meyer and

Milton E. Getz and in this regard plaintiff avers that it is informed and believes and therefore alleges the fact to be that the defendant M. G. Franklin had constructive and actual notice of the misappropriation and unlawful diversion of the said seventy thousand dollars ($70,000) by the defendants M. O. Meyer, S. O. Meyer and Milton E. Getz and of the intention of said last named defendants to misappropriate said moneys at the time that they were paid to the defendants M. O. Meyer and S. O. Meyer, respectively by the defendant M. G. Franklin; that, as aforesaid, no reference is made on the books of Getz Bros., & Company as to the payment of, or the agreement to pay said money, nor did Getz Bros., & Company ever receive the benefit of said payments made by said M. G. Franklin and the payments of the same by said defendant and the misappropriation of the same by defendants M. O. Meyer, S. O. Meyer and Milton E. Getz, and the purported execution of said contract of settlement in form between Getz Bros., & Company and said M. G. Franklin was carefully, deliberately and fraudulently withheld from the corporate books [fol. 29] of Getz Bros., & Company and thereby concealed from certain stockholders of Getz Bros., & Company and from the creditors and all the creditors of Getz Bros., & Company. That simultaneously with the execution of the agreement referred to in paragraph X (c) of this complaint, wherein M. G. Franklin agreed in substance and effect to pay said Getz Bros., & Company seventy thousand dollars ($70,000) in settlement of its claims against said Franklin, Rulofson and Samuels, the defendants M. O. Meyer, S. O. Meyer and Milton E. Getz made and entered into another written agreement with said M. G. Franklin on September 1, 1922, wherein and whereby said M. O. Meyer, S. O. Meyer and Milton E. Getz jointly and severally covenanted and agreed with said Franklin in substance and effect that if Franklin performed said first mentioned agreement and paid said sum of seventy thousand dollars ($70,000) as therein provided, said Getz Bros., & Company would never institute any proceeding of any character against said Franklin, Rulofson or Samuels, or any or either of them, on account of any matter or thing occurring prior to the date of said agreement or in any manner violate, rescind or annul or attempt to violate, rescind or annul the said [fol. 30] agreement between said Getz. Bros., & Company

and the said Franklin, or any of the provisions of said agreement, and the said M. O. Meyer, S. O. Meyer and Milton E. Getz did further jointly and severally promise, covenant and guarantee that they would hold said Franklin and said Rulofson and said Samuels and each of them harmless from any and all claims, demands, obligations and causes of action of whatsoever character and of and from all liability therefor that might thereafter be made against either or any of said Franklin, Rulofson or Samuels by or on behalf of said Getz Bros., & Company, or by any person in the capacity of stockholder or director of said Getz Bros., & Company on account of any matter or thing occurring prior to the date of said agreement.

(j) That plaintiff is informed and believes and therefore alleges the fact to be that at all times in this complaint mentioned subsequent to January, 1920, Getz Bros., & Company, was and now is insolvent, having liabilities far in excess of its assets, and said Getz Bros., & Company at all of the times mentioned in this complaint, subsequent to January, 1920, was unable to pay its said liabilities as the same matured.

[fol. 31]

XI

Neither Getz Bros., & Company, nor the plaintiff, nor plaintiff's assignor, nor any other creditor of Getz Bros., & Company, had any knowledge of the said combination and conspiracy hereinbefore alleged, or of any of the frauds committed or moneys misappropriated by any of the defendants in the above-entitled action, or more particularly of any of the frauds committed or moneys misappropriated by defendant M. G. Franklin in conjunction with A. C. Rulofson and Leon Samuels, until on or about December, 1923; that at no time mentioned in the complaint did plaintiff's assignor have any knowledge of any of said facts or matters, and the knowledge of plaintiff was acquired in the following manner; a representative and employee of one of the creditors of Getz Bros., & Company was investigating the affairs and financial condition of said Getz Bros., & Company in the month of November, 1923, and in the course of said investigation the said repre-

sentative made various inquiries of one R. A. May, a director of said Getz Bros., & Company, and in the latter part of November, 1923, the said representative was informed by said R. A. May of the alleged settlement in form made between said Getz Bros., & Company and defendant M. G. [fol. 32] Franklin and of the payment of said seventy thousand dollars ($70,000) by the defendant M. G. Franklin to the defendants M. O. Meyer and S. O. Meyer and of the misappropriation of said sum by the said defendants M. O. Meyer, S. O. Meyer and Milton E. Getz. Thereupon said representative and employee of said creditor proceeded to conduct an investigation which was made possible only by the expenditure of thousands of dollars and which consumed several months of time, which said investigation finally disclosed the fraudulent combination scheme and conspiracy entered into, performed and carried into effect by the defendant M. G. Franklin in conjunction with said A. C. Rulofson and Leon Samuels as alleged herein and more particularly set forth in paragraph VIII hereof.

That in making said discovery it was necessary for said representative and employee of said creditor to communicate with and obtain records from various persons, firms and corporations engaged in the manufacture of steel plates and other steel products scattered throughout the United States and in this regard it is alleged that said investigation resulting in the aforesaid discovery was most difficult in that the transactions investigated had occurred during [fol. 33] the years 1917 to 1920 and were varied and numerous in character and the persons familiar therewith and participating therein had not only destroyed numerous records applying thereto, but said persons were obviously not in a position to be required to assist the said representative and employee of said creditor in the discovery of their own fraudulent conduct.

That subsequent to December, 1923, said representative and employee of said creditor who made discovery of the facts as heretofore alleged in this paragraph related the same to plaintiff and for the first time made him acquainted with the same.

XII

That said transactions between the said A. C. Rulofson and Getz Bros., & Company and between the defendant

M. G. Franklin and said A. C. Rulofson and Leon Samuels were exceedingly numerous and most complicated, and an accounting is and will be required to determine the amount of Getz Bros., & Company's moneys misappropriated by defendant M. G. Franklin in conjunction with A. C. Rulofson and Leon Samuels.

XIII

That the creditors of Getz Bros., & Company are numerous and their claims are in various amounts, and the total [fol. 34] indebtedness of Getz Bros., & Company to said creditors exceeds the sum of five hundred thousand dollars ($500,000) as plaintiff is informed and believes.

XIV

That this complaint is brought on behalf of plaintiff and any other creditors who choose to join him and contribute to the expense of this action.

Wherefore plaintiff prays judgment against said defendants that an accounting be had herein to determine the amount of moneys belonging to Getz Bros., & Company misappropriated by said defendant M. G. Franklin in conjunction with said A. C. Rulofson and Leon Samuels, and that when the amount thereof is fixed and determined plaintiff and such other creditors of Getz Bros., & Company who may join plaintiff herein have judgment against said defendants jointly and severally for the full amount of their claims together with interest thereon up to the amount of said moneys misappropriated as aforesaid; further that plaintiff and such other creditors of Getz Bros., & Company who may join plaintiff herein have judgment against said defendants for any other additional moneys misappropriated by said defendants or any of them; and that plaintiff [fol. 35] have such other relief as may be meet and just in equity including costs of court to be incurred herein.

McKinstry, Haber & Firebaugh, Gavin McNab, Nat Schmulowitz, Attorneys for Plaintiff.

[File endorsement omitted.]

Duly sworn to by Peirce Coombes. Jurat omitted in printing.

[fol. 36] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

AMENDMENT TO SECOND AMENDED COMPLAINT—Filed March 6, 1928

Comes now the plaintiff in the above entitled action, and by leave of court first had and obtained, files this his amendment to the second amended complaint and includes in the statement of the cause of action against the defendants, and each of them, as set forth in said second amended complaint, the following addition and amendment to be added to paragraph X subparagraph (g) on page 19, at line 15, and alleges as follows:

"That as soon as said sum of Seventy thousand ($70,000.00) dollars was so paid to the said M. O. Meyer and S. O. Meyer, the said sum was secretly divided and distributed in currency between the said S. O. Meyer, M. O. Meyer, Milton E. Getz, Louis Getz & Company, a corporation, and R. A. May, and more particularly it is alleged that M. O. Meyer kept and retained Eighty-eight hundred and fifty ($8850.00) dollars of said sum; S. O. Meyer kept and retained Eighty-eight hundred and fifty ($8850.00) dollars of said sum, and the said S. O. and M. O. Meyer delivered and paid to Milton E. Getz eighty-eight hundred and fifty ($8850.00) dollars of said sum, to the said Louis Getz & [fol. 37] Company thirty-five thousand five hundred ($35,500.00) dollars of said sum, and to R. A. May the sum of forty-eight hundred and fifty ($4850.00) dollars of said sum. That the said Louis Getz & Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, and that the defendant Milton E. Getz and his three sisters were at all times mentioned in the complaint the sole stockholders of said last named company.

That at all times mentioned in the complaint and more particularly at the time said division was made, plaintiff had certain other stockholders owning and holding shares of stock in substantial amounts and none of the stockholders among whom said sum of Seventy thousand ($70,000.00) dollars was divided gave notice to any of the other stockholders of said division of funds, or of any of the

other facts alleged in said complaint, nor did any of said stockholders have any knowledge or information of said division of funds at the time the same was made, or of any of the other facts alleged in this complaint, nor was there ever paid to them nor did they ever receive any of said sum of Seventy thousand ($70,000.00) dollars; that said defendant Milton E. Getz had full knowledge of all [fol. 38] the facts known by S. O. Meyer and/or M. O. Meyer at the time they had any dealings with plaintiff and/or the defendants other than M. O. and S. O. Meyer, or any of said defendants; further, that Milton E. Getz had full knowledge of all acts and things done and committed by M. O. Meyer and/or S. O. Meyer, as alleged in this complaint, and approved the same and all of the same, and all things said or done by S. O. Meyer and/or M. O. Meyer, as alleged in the complaint were so said and done by prearrangement with defendant Milton E. Getz; further, said Milton E. Getz and S. O. Meyer and M. O. Meyer acted in confederation and collusion in all things said and done by either or any of said parties as alleged in this complaint and, more particularly, they jointly agreed in advance that said sum of seventy thousand ($70,000.00) dollars should be paid to S. O. Meyer and M. O. Meyer for division of the same, as thereafter made between and among the persons aforesaid; and, further, that said M. O. Meyer, S. O. Meyer and Milton E. Getz carefully, deliberately, fraudulently, jointly and by secret pre-arrangement caused to be withheld from the corporate books of the plaintiff the payment of or the agreement to pay said sum of Seventy thousand ($70,000.00) dollars to plaintiff, or to either of said Meyers or anyone else, or the purported [fol. 39] execution of said contract of settlement in form between plaintiff and M. O. Meyer, or any other facts or things bearing upon said alleged settlement agreement or the payment of any moneys thereunder."

McKinstry, Haber & Firebaugh, Gavin McNab, Nat Schmulowitz, Attorneys for Plaintiff.

[File endorsement omitted.]

Duly sworn to by Peirce Coombes. Jurat omitted in printing.

[fol. 40] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

DEMURRER OF DEFENDANT MILTON E. GETZ TO SECOND AMENDED COMPLAINT—Filed Aug. 20, 1926

Milton E. Getz, one of the defendants above named, files this his demurrer to the second amended complaint of the plaintiff on file herein and for grounds of demurrer specifies the following:

I

That said second amended complaint does not state facts sufficient to constitute a cause of action.

II

That there is a defect or misjoinder of parties plaintiff in this: That the creditors of Getz Bros. & Company, other than the plaintiff, Peirce Coombes, are not made parties plaintiff herein.

III

That there is a defect or misjoinder of parties plaintiff in this: That the stockholders of Getz Bros., & Company are not made parties plaintiff herein.

IV

That there is a defect or misjoinder of parties defendant [fol. 41] in this: That the defendant Milton E. Getz is improperly joined as party defendant herein.

V

That several causes of action have been improperly united in said second amended complaint, to wit, an alleged cause or causes of action against the defendant M. G. Franklin, for alleged fraud, with an alleged cause or causes of action against the defendant M. G. Franklin for alleged misappropriation, and with an alleged cause or causes of action against the defendants Milton E. Getz, M. O. Meyer and S. O. Meyer, as directors of Getz Bros. & Company,

for moneys alleged to have been misappropriated by the defendant M. G. Franklin, and with an alleged cause or causes of action against said defendants Milton E. Getz, M. O. Meyer and S. O. Meyer for the alleged misappropriation by them personally of the sum of $70,000, in said second amended complaint mentioned and with an alleged cause or causes of action upon that certain guaranty mentioned in paragraph X (i) thereof. That each of the causes of action so united does not affect all the parties to the action.

VI

That several causes of action are united in said second [fol. 42] amended complaint and not separately stated, to wit, an alleged cause or causes of action against the defendant M. G. Franklin, for alleged fraud, with an alleged cause or causes of action against the defendant M. G. Franklin for alleged misappropriation, and with an alleged cause or causes of action against the defendants Milton E. Getz, M. O. Meyer and S. O. Meyer, as directors of Getz Bros. & Company, for moneys alleged to have been misappropriated by the defendant M. G. Franklin, and with an alleged cause or causes of action against said defendants Milton E. Getz, M. O. Meyer and S. O. Meyer for the alleged misappropriation by them personally of the sum of $70,000 in said second amended complaint mentioned and with an alleged cause or causes of action upon that certain guaranty mentioned in paragraph X (i) thereof.

VII

That several causes of action against the defendants Milton E. Getz, M. O. Meyer and S. O. Meyer are united in said second amended complaint and not separately stated, to wit, an alleged cause of action against said defendants as directors of Getz Bros. & Company for moneys alleged to have been misappropriated by the defendant M. G. Franklin and an alleged cause of action against [fol. 43] said defendants for the alleged misappropriation by them personally of the sum of $70,000 in said second amended complaint mentioned and an alleged cause of action against said three defendants upon that certain guaranty mentioned in paragraph X (i) thereof.

VIII

That several causes of action against the defendant Milton E. Getz are united in said second amended complaint and not separately stated, to wit, an alleged cause of action against said defendant as a director of Getz Bros. & Company for moneys alleged to have been misappropriated by the defendant M. G. Franklin and an alleged cause of action against said defendant Milton E. Getz for the alleged misappropriation by said Milton E. Getz together with the defendants M. O. Meyer and S. O. Meyer, of the sum of $70,000 in said second amended complaint mentioned and an alleged cause of action against said defendant Milton E. Getz, upon that certain guaranty mentioned in paragraph X (i) thereof.

IX

That said second amended complaint is ambiguous in each of the following particulars:

[fol. 44] a. It cannot be ascertained therefrom whether the defendant M. G. Franklin in his capacity as general manager of the export business of Getz Bros. & Company was an officer of said corporation.

b. It cannot be ascertained therefrom whether the moneys alleged to have been misappropriated by said defendant M. G. Franklin are alleged to have been misappropriated by him as treasurer of Getz Bros. & Company or as general manager of the export business of said corporation.

c. It cannot be ascertained therefrom whether the moneys alleged to have been misappropriated by said defendant M. G. Franklin are alleged to have been misappropriated by him as an officer of Getz Bros. & Company.

d. It cannot be ascertained therefrom how much of the money alleged to have been misappropriated from Getz Bros. & Company by M. G. Franklin, A. C. Rulofson and Leon Samuels is alleged to have been misappropriated by the defendant M. G. Franklin.

e. It cannot be ascertained therefrom whether the alleged losses to Getz Bros. & Company, by reason of the

actions of said M. G. Franklin, as alleged in said second [fol. 45] amended complaint, were caused by negligence or by fraud on the part of said M. G. Franklin.

f. It cannot be ascertained therefrom how much of the losses alleged to have been sustained by Getz Bros. & Company from the actions of said M. G. Franklin were caused by the negligence of the said M. G. Franklin as distinguished from the fraud of said M. G. Franklin.

g. It cannot be ascertained therefrom whether the sums alleged to have been realized by M. G. Franklin, A. C. Rulofson and Leon Samuels, as therein alleged, were profits or misappropriations.

h. It cannot be ascertained therefrom to what creditors Getz Bros. & Company was indebted, as alleged in subdivision (f) and (j) of paragraph X of said second amended complaint.

i. It cannot be ascertained therefrom who are the creditors of Getz Bros. & Company, other than the plaintiff.

j. It cannot be ascertained therefrom who are the stockholders of Getz Bros. & Company.

k. It cannot be ascertained therefrom from what stock- [fol. 46] holders of Getz Bros. & Company the alleged misappropriation mentioned in subdivision (i) of paragraph X of said second amended complaint was concealed.

l. It cannot be ascertained therefrom from what creditors of Getz Bros. & Company the alleged misappropriation mentioned in subdivision (i) of paragraph X of said second amended complaint was concealed.

m. It cannot be ascertained therefrom when plaintiff acquired knowledge of the alleged wrongful acts of M. G. Franklin, A. C. Rulofson and Leon Samuels mentioned in said second amended complaint.

n. It cannot be ascertained therefrom at what prices or in what quantities the defendant M. G. Franklin made the alleged purchases from A. C. Rulofson which are mentioned in paragraph VIII (d) First thereof.

o. It cannot be ascertained therefrom what items make up the sums of $877,858.10 or $1,379,083.33, mentioned on page 6 thereof.

p. It cannot be ascertained therefrom when or in what quantities the defendant M. G. Franklin purchased from Brier Hill Steel Company the products mentioned in paragraph VIII (d) Second on page 7 thereof.

[fol. 47] q. It cannot be ascertained therefrom from whom the defendant M. G. Franklin purchased the bamboo steel mentioned in paragraph VIII (d) Third on page 8 thereof.

r. It cannot be ascertained therefrom what products the defendant M. G. Franklin pretended to sell to A. C. Rulofson as alleged in paragraph VIII (d) Fourth thereof.

s. It cannot be ascertained therefrom from what firm the defendant M. G. Franklin purchased the products mentioned in paragraph VIII (d) Fifth thereof.

t. It cannot be ascertained therefrom from what firm the defendant M. G. Franklin purchased the products mentioned in paragraph VIII (d) Sixth thereof.

u. It cannot be ascertained therefrom from what firm the defendant M. G. Franklin purchased the products mentioned in paragraph VIII (d) Seventh thereof.

v. It cannot be ascertained therefrom whether any commission was paid Leon Samuels or the amount thereof, or what is meant by the reference to commission to said Leon Samuels contained in paragraph VIII (e) thereof.

w. It cannot be ascertained therefrom what relief is sought against the defendant Milton E. Getz.

[fol. 48] X

The said second amended complaint is unintelligible in each of the particulars wherein in paragraph IX hereof it is stated to be ambiguous.

XI

That said second amended complaint is uncertain in each of the particulars wherein in paragraph IX hereof it is stated to be ambiguous.

XII

That the alleged cause of action against the defendant Milton E. Getz as a director of Getz Bros. & Company, for moneys alleged to have been misappropriated by the defendant M. G. Franklin, is barred by section 359 of the Code of Civil Procedure.

XIII

That the alleged cause of action against the defendant Milton E. Getz for the alleged misappropriation by him, together with the defendants M. O. Meyer and S. O. Meyer, of the sum of $70,000, mentioned in said second amended complaint, is barred by subdivision 1 of section 339 of the Code of Civil Procedure.

[fol. 49] Wherefore said defendant, Milton E. Getz, prays to be hence dismissed with his costs.

Lawler & Degnan, Pillsbury, Madison & Sutro, Attorneys for defendant, Milton E. Getz.

I hereby certify that this demurrer is not filed for delay and that in my opinion it is well taken in point of law.

Felix T. Smith.

[File endorsement omitted.]

In Supreme Court of City and County of San Francisco

Opinion on Demurrer of Defendant Milton E. Getz to Second Amended Complaint as Amended

After study of the briefs submitted in the above mentioned action upon the demurrer of the defendant Getz to the second amended complaint as amended, I have reached the following conclusions:

1. The fraudulent diversion of funds by Franklin constituted misappropriations within the meaning of Section 3 [fol. 50] of Article XII of the Constitution.

Dean v. Shingle, 198 Cal. 652, 664;

San Leandro Canning Co. v. Perillo, 84 Cal. App. 635, 641.

2. The plaintiff possesses competency to sue. In actions of this character brought by a creditor, one creditor may sue for himself and such others as may choose to join during the pendency of the action, or others whom the Court may order to be brought in. He is not obliged to seek out and join all others who may have claims.

Nicolls v. Rice, 147 Cal. 633, 640.

3. The action under the constitutional provision is not classed strictly as a creditor's bill, and the right to sue is not dependent upon first reducing the claim to judgment. Neither is it essential in such an action that the debt in a favor of the plaintiff should have been incurred before the misappropriation took place.

Winchester v. Howard, 136 Cal. 432, 446-447;
Dean v. Shingle, 198 Cal. 652, 661.

4. The right of action in favor of a creditor because of misappropriations of corporate funds is a right created by statute. And under Section 359 of the Code of Civil Procedure, as construed by our Appellate Courts, the cause [fol. 51] is barred at the expiration of three years after the misappropriation occurs, without regard to the time of discovery.

Royal Trust Co. v. McBean, 168 Cal. 642, 650;
Johnson v. Hinkel, 29 Cal. App. 78, 82.

I see no reason for holding that the Legislature had not power to adopt such a statute; and the judicial construction given to it has been acquiesced in without amendment.

5. While the constitutional provision is somewhat penal in character in its effect upon an innocent director, it is at the same time remedial in the benefits afforded to creditors and stockholders. The right is a statutory right given to particular classes of individuals as a measure of special security to them. No penalty in the legal sense is imposed upon the directors as punishment for an offense against public justice irrespective of damage suffered; but the directors are charged with a contractual liability to make compensation for any losses actually sustained through the misappropriation of corporate property.

Winchester v. Howard, 136 Cal. 432, 444;
Dean v. Shingle, 198 Cal. 652, 662.

See also

Stephens v. Overstolz, 43 Fed. 465;
Hutchinson v. Young, 80 N. Y. S. 259.

[fol. 52] The action is properly a suit in equity for an accounting in the interest of all those of the designated classes who have suffered injury.

Winchester v. Mabury, 122 Cal. 522, 524;
Winchester v. Howard, 136 Cal. 432, 446;
Dean v. Shingle, 198 Cal. 652, 660.

And the liability being contractual, the cause of action survives after the death of a director (Major v. Walker, 23 Cal. App. 465), whereas an action for a statutory penalty ordinarily abates (1 C. J. 209, Section 406).

6. Though in an action by the corporation against Franklin, his fraudulent concealment might serve to toll the statute of limitations as to him, yet when he is charged here as a defendant upon his constitutional liability, the same statute which raises a bar in behalf of his fellow directors operates equally as a shield to him.

Accordingly, no special dispensation may be claimed in behalf of plaintiff because the other directors were in a sense made sureties for Franklin's honesty.

7. The plaintiff disclaims any intention to state a case based on the division of the recaptured sum of $70,000 among the defendants other than Franklin. If the com- [fol. 53] plaint can be said to exhibit phases of a creditor's bill to reach equitable assets of the corporation in the hands of third parties, it must be held defective for any such purpose.

In an action of that character, creditor, such a plaintiff, must show either that he has reduced his claim to judgment and has exhausted his legal remedies of enforcement, or that the omission is excused by circumstances pleaded.

7 Cal. Jur. 791-792;
Shafer v. Fisher, 85 Cal. App. 43, 45;
Delaney P. & R. Co. v. Chrystal P. P. Co., 88 Cal. App. 784, 788;
Fornasieri v. Cosmoart R. & B Co., 58 Cal. App. Dec. 435 (274 Pac. 597);
Nielsen v. Gillespie, 58 Cal. App. Dec. 792 (275 Pac. 500).

Unless plaintiff were able to plead a judgment in his favor or that of his assignor, it would seem necessary also to join the corporation as a defendant.

For reasons stated, the demurrer of the defendant Getz appears to be well founded. It seems hardly likely that the fundamental objections to the complaint can be overcome; but in sustaining the demurrer, I will allow ten days to amend.

Walter Perry Johnson, Judge.

[fol. 54] In Superior Court of City and County of San Francisco

Demurrer of Defendant Milton E. Getz to Amendment to Second Amended Complaint—Filed Mar. 15, 1928

Milton E. Getz, one of the defendants above named, files this his demurrer to the amendment to the second amended complaint of the plaintiff on file herein and for grounds of demurrer specifies the following:

I

That said amendment to said second amended complaint does not state facts sufficient to constitute a cause of action.

II

That said amendment to said second amended complaint is ambiguous in each of the following particulars:

a. It cannot be ascertained therefrom how the defendant Milton E. Getz approved the various things therein alleged to have been done by S. O. Meyer and/or M. O. Meyer.

b. It cannot be ascertained therefrom what liability is therein asserted against the defendant Milton E. Getz.

III

That said amendment to said second amended complaint is unintelligible in each of the particulars wherein in paragraph II hereof it is stated to be ambiguous.

IV

That said amendment to said second amended complaint is uncertain in each of the particulars wherein paragraph II [fol. 55] hereof it is stated to be ambiguous.

Wherefore said defendant Milton E. Getz prays to be hence dismissed with his costs.

Lawler & Degnan, Pillsbury, Madison & Sutro, Attorneys for Defendant Milton E. Getz.

I hereby certify that this demurrer is not filed for delay and that in my opinion it is well taken in point of law.

Alfred Sutro.

Stipulation

It is hereby stipulated that the demurrer of the defendant Milton E. Getz to the second amended complaint herein may be deemed to be a demurrer, supplemented by the foregoing matters, to said second amended complaint as amended by the above mentioned amendment to said second amended complaint, and that said demurrer of defendant Milton E. Getz to second amended complaint need not be reingrossed.

Dated March 15th, 1928.

McKinstry, Haber & Firebaugh, Nat Schmulowitz, Attorneys for Plaintiff.

Receipt of a copy of the within demurrer is hereby admitted this 15th day of March 1928.

McKinstry Haber & Firebaugh, Nat Schmulowitz, Attorney- for ——.

[File endorsement omitted.]

[fol. 56] In Superior Court of City and County of San Francisco

Minute Entry of Submission.—September 3 1926

No. 164,461

In this action good cause appearing the Court ordered demurrers of certain defendants to second amended com-

plaint and demurrer of M. E. Getz to second amended complaint submitted.

In Supreme Court of City and County of San Francisco

In Open Court

No. 164,461

Order Sustaining Demurrers.—Jan 3, 1928

In this action, having been heretofore submitted and good cause appearing the Court ordered demurrers of certain defendants to 2nd amended complaint and demurrer of M. E. Getz to 2nd amended complaint sustained.

[fol. 57] In Superior Court of City and County of San Francisco

In Open Court

No. 164,461

Order Sustaining Demurrer.—Mar. 18, 1930

This demurrer having been heretofore submitted the Court at this time orders demurrer of defendant Getz to second amended complaint as amended sustained—10 days to amend—Opinion filed.

[fol. 58] In Superior Court of City and County of San Francisco

No. 164,461

Judgment on Demurrer Sustained—April 14, 1930

In this action the Defendant Milton E. Getz having demurred to Plaintiff's Second Amended Complaint as amended on file herein, and said Demurrer having been sustained by order of Court, with leave to Plaintiff to amend

within ten days, and said Plaintiff having failed to amend within the time allowed, after due notice of sustaining said Demurrer had been given and the default of said Plaintiff in the premises having been duly entered according to law; now upon application of Messrs. Pillsbury Madison & Sutro Attorney for said Defendant Milton E. Getz to the clerk of said Court, judgment is hereby entered herein in favor of Defendant Milton E. Getz and against said Plaintiff.

Wherefore, by reason of the law and the premises aforesaid,

It is ordered, adjudged and decreed that Peirce Coombs Plaintiff do take nothing by this said action as against Milton E. Getz, one of the Defendants, but that judgment be and the same is hereby entered herein in favor of said Defendant Milton E. Getz and against said Plaintiff for said Defendants' costs and disbursements incurred in this action, amounting to the sum of $—.

Judgment entered —— —, 19—, Book —, Page —. Recorded Apr. 14, 1930, 2:55 o'clock P. M., Vol. 314, Page 58. H. I. Mulcrevy, Clerk, by S. L. Licht, Deputy Clerk.

[fols. 59 & 60] Clerk's certificates to foregoing transcript omitted in printing.

[fol. 61] Judge's certificate to foregoing transcript omitted in printing.

[fol. 62] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

[Title omitted]

NOTICE OF APPEAL—Filed April 21, 1930.

To the clerk of the above-entitled court:

Notice is hereby given that the plaintiff in the above entitled action hereby appeals to the Supreme Court of

the State of California from the judgment dismissing the second amended complaint, as amended, as against the defendant Milton E. Getz, which said judgment followed an order sustaining the demurrer of said Milton E. Getz to said second amended complaint, as amended, and which said judgment is dated April 14, 1930, and was entered on April 14, 1930.

The said plaintiff appeals from the said order and judgment and from the whole thereof.

Dated April 21st, 1930.

McKinstry, Haber & Firebaugh. A. J. W. D. C. C. Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, by Nat Schmulowitz, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 63] In Superior Court of City and County of San Francisco

[Title omitted]

Notice to Clerk to Prepare Transcript on Appeal—Filed April 21, 1930

To the clerk of the above-entitled court:

Please take notice that the plaintiff intends to appeal from the order and judgment dated April 14th, 1930, and entered on April 14th, 1930, as dismissing the second amended complaint as amended as against the defendant Milton E. Getz following an order sustaining the demurrer of Milton E. Getz, to said second amended complaint as amended, and plaintiff accordingly requests that a transcript, including the second amended complaint as amended and the demurrer of Milton E. Getz and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, together with the order sustaining the demurrer of Milton E. Getz to the said second amended complaint as amended and the judgment of dis-

missal following said order, and all matters to which the [fol. 64] same relate, be made up and prepared.

Dated April 21st, 1930.

McKinstry, Haber & Firebaugh, Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, by Nat Schmulowitz, Attorneys for Plaintiff. A. J. W. D. C. C.

[File endorsement omitted.]

[fol. 65] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

STIPULATION

It is hereby stipulated that the original complaint in the above-entitled matter was filed on the 22nd day of December, 1925, and this stipulation may be included in the transcript on appeal herein.

McKinstry, Haber & Firebaugh and Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Attorneys for Plaintiff and Appellant. Pillsbury, Madison & Sutro, Attorneys for Defendant and Respondent Milton E. Getz.

[fol. 66] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

S. F. No. 13939

PEIRCE COOMBES, Plaintiff and Appellant,

vs.

MILTON E. GETZ, Defendant and Respondent; M. G. FRANKLIN, M. O. Meyer, and S. O. Meyer, Defendants

NOTICE OF MOTION FOR ORDER DISMISSING APPEAL—Filed Jan. 2, 1931

To Peirce Coombes, the appellant above named, and to Messrs. McKinstry, Haber and Firebaugh and Messrs. Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, his attorneys:

Please take notice that Milton E. Getz, the above named defendant and respondent, will on Tuesday, the 13th day of January, 1931, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, move the Honorable, the above entitled Court, in its courtroom in the State Building, Civic Center, in the City and County of San Francisco, State of California, for an order dis-
[fol. 67] missing the appeal of the plaintiff and appellant herein to the above entitled court in the above entitled action from the judgment heretofore made and entered by the Superior Court of the State of California, in and for the City and County of San Francisco, in favor of said defendant and respondent.

Said motion will be made upon the ground that said action is against said defendant and respondent for the recovery of certain sums of money alleged to have been embezzled or misappropriated by an officer (other than said defendant and respondent) of Getz Bros. & Company, a California corporation; that the alleged liability of said defendant and respondent for said sums is asserted under and pursuant to section 3 of article XII, of the Constitution of the State of California, as the same existed prior to November 4, 1930, and the alleged cause of action in the amended complaint herein against said defendant and respondent is based upon said section 3 of article XII; that on November 4, 1930, said section 3 of said article XII was repealed, and on said 4th day of November, 1930, the repeal thereof became effective; that said alleged cause of action of plaintiff and appellant has been extinguished, and that said action has abated.

Said motion will be based upon all the records, papers and files in said action, including appellant's opening brief and this notice of motion.

Attached hereto and filed herewith is a memorandum of points and authorities, and also the certificate of the Secretary of State of the State of California, over the Great Seal of said state, certifying to the vote of the
[fol. 68] people at the general election held in the State of California on Tuesday, November 4, 1930, whereby said section 3 of article XII was repealed.

Dated San Francisco, January 2, 1931.

Lawler & Degnan, Pillsbury, Madison & Sutro, Attorneys for Respondent. Alfred Sutro, Eugene M. Prince, of Counsel.

[fol. 69] STATE OF CALIFORNIA:

Department of State

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that as a result of the vote cast in the State of California at the General Election held Tuesday, November 4, 1930, there were 530,432 votes cast in favor of proposition No. 16, being Senate Constitutional Amendment No. 24, and 360,968 votes cast against said proposition.

In witness whereof I have hereunto set my hand and caused the Great Seal of the State of California to be affixed hereto this 11th day of December, 1930.

Frank C. Jordan, Secretary of State, by Chas. J. Hagerty, Deputy. (Seal.)

[fol. 70] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA. IN BANK

S. F. No. 13939

PEIRCE COOMBES, Plaintiff and Appellant,

vs.

M. G. FRANKLIN, MILTON E. GETZ, M. O. MEYER, and S. O. MEYER, Defendants; Milton E. Getz, Respondent

OPINION—Filed July 23, 1931

The appeal in this cause must be dismissed and it is so ordered.

The reason for this holding is that the authority for the maintenance of the action against respondent has been removed by the elimination of the constitutional provision which furnished its sole support.

The complaint assumes the form of a general creditors' and stockholders' bill seeking to hold the defendants, and particularly respondent Getz, for embezzlements and defalcations of a fellow director of the corporation known as Getz Bros. & Company, which said defalcations aggregated the sum of about $550,000. Demurrer of said respondent

to the complaint was sustained. Appellant declined to amend and judgment passed for respondent. This appeal followed.

Section 3 of Article XII of the state Constitution, prior to November 4, 1930, read in part as follows: "The directors or trustees of corporations and joint stock associations shall be jointly and severally liable to the creditors and *stockholders for all moneys embezzled or misappropriated* by the officers of such corporation or joint stock association, during the term of office of such director or trustee." [fol. 71] On said last mentioned day, however, the People approved at a general election an amendment to said Constitution which repealed the said provision above quoted without a saving clause or reservation of any kind.

The rule of law in this respect is not in doubt. In Napa State Hospital v. Flaherty, 134 Cal. 315, 317, the court stated the rule as follows: "It is a rule of almost universal application that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause." This rule has been consistently and continuously adhered to since said date: Moss v. Smith, 171 Cal. 777, 787; Freeman v. Glenn Co. Tel. Co., 184 Cal. 508, 510; Callet v. Alioto, 80 Cal. Dec. 146, 147-8; Krause v. Rarity, 80 Cal. Dec. 530, 535-7. It is again referred to and approved in Peterson v. Ball, 81 Cal. Dec. 211. A case especially applicable to repeal of a constitutional provision is Willcox v. Edwards, 162 Cal. 455; see also Peo. v. Bank of San Louis Obispo, 159 Cal. 65, and many other cases.

The cases of Berg v. Traeger, 80 Cal. Dec. 319 and Harris v. Moore, 102 Cal. App. 413 are not in conflict with this conclusion. These cases, after declaring the rule as above noted, simply sustain appeals duly perfected prior to a change in the statute, shifting the appellate jurisdiction of that class of cases. To apply the above rule to a cause of action which has not yet reached the stage of final judgment is not to give the constitutional provision a retrospective operation. Hastain & Purman, Inc. v. Superior Court, 81 Cal. Dec. 952 and cases therein cited.

Section 2 of Article XXII of the Constitution manifestly has no application to the situation here and constitutes no

[fol. 72] saving clause to the former provision here under discussion. Neither do we find any warrant for the contention that a remedy of the kind here sought existed at common law. Both in reason and authority this contention cannot be sustained. The same is true of the contention that an impairment of the obligation of the contract in violation of the constitution would result from this application of the rule pronounced above; hence the conclusion already stated.

Preston, J.

We concur:

Shenk, J.; Curtis, J.; Waste, C. J.; Seawell, J.

[fol. 73] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR REHEARING—Filed Aug. 12, 1931

To the Honorable William H. Waste, Chief Justice, and to all Associate Justices of the Supreme Court of the State of California:

Appellants most respectfully petition the court for a rehearing in said cause; and move to vacate and set aside the order heretofore made dismissing the appeal therein, and for an order reinstating said cause. Joseph L. Lewinson and W. H. Douglass join in said petition as friends of the court, and as attorneys in the case of W. H. Douglass on behalf of all creditors v. Gilbert H. Beesemyer et al., No. [fol. 74] 31332, now pending in the Superior Court of the state of California, in and for the county of Los Angeles, involving the liability of the directors of the defunct Guaranty Building and Loan Association in an amount in value of more than $7,000,000 embezzled by an officer of said company.

This case is one of great importance in this state because the decision rendered therein holds that the repeal of section 3 of article XII of the State Constitution relieves directors of corporations from their liability on obligations incurred prior to the time of the repeal, although the

obligations of directors under section 3 of article XII have been definitely held by this court to be contractual in character, and it has been held by the United States Supreme Court, as well as other courts of high respectability, that to give retroactive effect to the repeal of constitutional or statutory provisions substantially similar to sections 3 of article XII of our State Constitution, impairs the obligation of contract under section 10 of article I of the Constitution of the United States.

We make bold to assert the authorities show that the rule permitting retroactive repeals quoted in the opinion in the case at bar from Napa etc. Hospital v. Flaherty, 134 Cal. 315, is not applicable to constitutional provisions or statutes like section 3 of article XII of the State Constitution that impose liabilities which are contractual or quasi-contractual.

While section 3 of article XII of the State Constitution was in force, Creditors dealing with California Corporations must be deemed to have extended credit partly in reliance upon Directors' liability, and the constitutional provision creating that liability became a part of contracts between creditors and corporations with the assent of the directors; and the directors became liable on such contracts.

[fol. 75] Dean v. Shingle, 198 Cal. 652:
Railway Co. v. Wall, 241 U. S. 87, 60 L. Ed. 905;
Platt v. Wilmot, 193 U. S. 602, 48 L. Ed. 809.

In Dean v. Shingle, supra, it was said:

"The liability imposed by the provisions is that of surety * * *. Directors take office knowing the responsibility they assume in so doing. In the eye of the law they do so as freely and voluntarily as they would do if they signed a bond agreeing to be responsible for the conduct of the corporate officers" (198 Cal. 66).

In Railway Co. v. Wall, supra, the United States Supreme Court said:

"As this court often has held, the laws in force at the time and place of the making of a contract, and which affect its validity, performance and enforcement, enter into and

form a part of it, as if they were expressly referred to or incorporated in its terms" (60 L. Ed. 907).

In Platt v. Wilmot, supra, an action involving stockholders' liability, the court said:

"Also, while the liability is contractual in its nature, it arises out of the Constitution or the statute, or from a combination of both, by virtue of the application of general principles of law to the facts in the case. Neither the Constitution nor the statute says that the liability is contractual, but, as the Constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a contractual liability upon these facts" (48 L. Ed. 814).

The liability of directors under Section 3 of Article XII of the State Constitution has been held to be contractual and not penal.

Dean v. Shingle, 198 Cal. 652;
Major v. Walker, 23 Cal. App. 465;
O'Connell v. Walker, 12 Cal. App. 694;
Hercules Oil Co. v. Hocknell, 5 Cal. App. 702;
Brown v. Major, 164 Fed. 673 (C. C. A. 9th);
Winchester v. Howard, 136 Cal. 432.

[fol. 76] The courts have repeatedly said that the liability of directors under section 3 of Article XII is contractual. In Brown v. Major, supra, it is said:

"We have here a decision of the Supreme Court of California construing the above-quoted provision of the Constitution of that state, in which that court distinctly held that the liability imposed by section 3 of article 12 of the Constitution of California is one of suretyship, and therefore of contract" (P. 677).

In Dean v. Shingle, supra, after speaking of certain statutes that have been held to create penal liability, the court said:

"But section 3 of article XII of the Constitution has received a different construction in the previous decisions of this court, in which it has been held that the liability of

directors of corporations to the creditors and stockholders for moneys embezzled or misappropriated by the officers of the corporation, during the term of office of such directors is one of suretyship, and, therefore, one of contract. * * * 'Nor do (we) appreciate the importance of the question whether the law is penal or not. It is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss. But the liability created is that of suretyship, in which the innocent always suffers for the guilty, and therefore the surety may always stand upon the very letter of his bond.' This construction of the Constitution has been followed by the federal courts (Brown v. Major, supra), and by the district courts of appeal of this state (Hercules Oil Co. v. Hocknell, 5 Cal. App, 702, 705 (91 Pac. 341); Major v. Walker, 23 Cal. App. 465, 467 (138 Pac. 360)), and was, in effect, approved in Moss v. Smith, 171 Ca. 777, 786 (155 Pac. 90)" (pp. 662-663).

Not only have the courts declared the liability of directors under section 3 of article XII to be contractual, but they have so held very definitely.

Dean v. Shingle, supra, held that the liability was limited to the loss suffered by the corporation, and was not for the amount embezzled or misappropriated. Major v. Walker, supra, held that the liability survived the death of the [fol. 77] director. O'Connell v. Walker, supra, held that a writ of attachment might issue in a suit based on the liability.

These are the incidents of contractual liability. This is pointed out in Brill on "The law of California Corporations," section 227, where it is said:

"The liability thus imposed upon directors is that of sureties for other directors and officers in respect to misappropriations and embezzlements. It is not a penal liability in the technical sense of that term, but is contractual in its nature, and hence will survive the death of a defendant director, and may form the basis for a writ of attachment."

Referring to statutes "making directors personally liable for debts of the corporation * * * too numerous

to collect and classify," Judge Thompson, one of the most acute writers on the subject of corporations, says:

"These statutes are generally regarded as penal, so that actions upon them are actions for penalties, although the sound view is believed to be that they should not be construed as being penal, but simply as presenting a case where the grant of a franchise to be personally exempt from the indebtedness which the grantees contract in their own behalf is made with a qualification which reads itself into the grant.

"In a recent federal case Mr. U. S. District Judge Lochren took substantially this view of such a statute. Fitzgerald v. Weidenbeck, 76 Fed. 695. See further to the effect that such statutes are not penal, Banks v. Darden, 18 Ga. 318; Neal v. Moultrie, 12 Ga. 104; Farr v. Briggs, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930 (hence enforceable in another state); Davis v. Mills, 99 Fed. 39 (same ruling). Such an action therefore survives against the personal representatives of the directors. Taylor v. Cummings, 17 Nat. Corp. Rep. 732" (10 Cyc. 853).

[fol. 78] The liability of directors under statutes at least as stringent as Section 3 of Article XII has been held contractual by the Federal courts.

Huntington v. Attrill, 146 U. S. 657, 36 L. Ed. 1123;
Davis v. Mills, 99 Fed. 39 (C. C. Conn.);
In re Post, 12 Fed. (2nd) 941 (D. C. N. Y.).

When the statutory liability of directors is contractual or quasi-contractual, it has been held that retroactive repeal impairs the obligation of contract guaranteed by the Constitution of the United States.

10 Cyc. 670;
14a C. J., 197-201;
Brown v. Ware, 88 Atl. 507 (Vt.).

Judge Thompson sums up the matter as follows:

"Under the operation of the principle that the repeal of a penal statute puts an end to all rights of action which have accrued under it, even though such actions may be pending, unless the statute contains a saving clause to the contrary, many courts have held that statutes of the kind

under consideration, being penal, a repeal discharges all rights of action under them; while other courts, regarding them as creating a liability quasi ex contractu, and still others as being remedial in their nature, hold the contrary'' (10 Cyc. 854-855).

In 14a C. J., 201, it is said:

"In accordance with the rule governing penal statutes generally, courts which view the statutes under consideration as penal hold that a repeal discharges all rights of action under them unless the statute contains a saving clause to the contrary, or unless the case falls within a general saving statute applicable to statutes imposing penalties; while courts which regard them as creating a liability quasi ex contractu hold the contrary."

[fol. 79] Irrespective of the statutory liability of directors, it is settled that the repeal of a statute becoming a constituent part of a contract by legal implication, will not be construed as retroactive in its operation, because so to construe it would impair the obligation of contract.

Modern Brotherhood, etc. v. Lock, 125 Pac. 556 (Colo. App.);
Burton v. Emerson, 4 G. Greene 393 (Ia.);
Nevada Bank v. Steinmitz, 64 Cal. 301 (30 Pac. 970).

The stockholders' liability imposed by Section 3 of Article XII of the State Constitution prior to its repeal was held to be contractual.

6 Cal. Jur. 992, Sec. 375; 997, Sec. 378.

See, also:

Aronson & Co. v. Pearson, 199 Cal. 286;
Ferguson v. Sherman, 116 Cal. 169;
Whittier v. Wisscher, 189 Cal. 450;
Western Pacific Ry. Co. v. Godfrey, 166 Cal. 346;
Kennedy v. Bank, 97 Cal. 93.

Inasmuch as the stockholders' liability was created by the same section as the directors' liability, and the same word "liable" was used in defining the liability of both, it

should be construed as creating a contractual liability as to the directors as well as to the stockholders.

Civic Center Asso., etc. v. Railroad Commission, 175 Cal. 441, 449.

Stockholders' liability imposed by constitutions or statutes of sister states has been held to be contractual by the United States Supreme Court.

Platt v. Wilmot, 193 U. S. 602;
Converse v. Hamilton, 224 U. S. 243;
Selig v. Hamilton, 234 U. S. 652.

[fol. 80] In cases of stockholders' liability it has been held by the United States Supreme Court and lower Federal courts that an attempt to destroy a liability already incurred, or the remedy therefor, by repeal or amendment of the statute or constitution creating the liability, impairs the obligation of contract under Section 10 of Article I of the Constitution of the United States.

Hathorn v. Calef, 2 Wall. 10, 17 L. Ed. 776;
Ochiltree v. R. R. Co., 21 Wall. 249, 22 L. Ed. 546;
Bernheimer v. Converse, 206 U. S. 516, 529, 51 L. Ed. 1163-1174;
Pittsburgh Steel Co. v. Baltimore Equitable Society, 226 U. S. 455, 458, 57 L. Ed. 297, 300;
Harrison v. Remington Paper Co., 140 Fed. 385 (C. C. A. 8th);
Irvine v. Elliott, 203 Fed. 82, 96, 97-109 (D. C. Del.);
Blackburn v. Irvine, 205 Fed. 217 (C. C. A. 3).

See also:

Shreveport v. Cole, 129 U. S. 37;
Dodge v. Woolsey, 18 How. 331;
Clay Co. v. Soc. for Sav., 104 U. S. 579.

In Hathorn v. Calef, supra, it was held that a Maine statute relieving stockholders from double liability as provided for in their charter, which was construed by the Supreme Court of Maine to be retroactive, impaired the obligation of contract guaranteed by the Constitution of the United States.

In Ochiltree v. R. R. Co., supra, the court had under consideration the effect of the repeal amendment of a consti-

tutional provision of Missouri. The Constitution of Missouri in 1865 provided: "In all cases each stockholder shall be individually liable over and above the stock by [fol. 81] him or her owned, and any amount unpaid thereon, and a further sum at least equal in amount to such stock." In 1870 the Missouri Constitution was amended so as to relieve stockholders of this double liability. The Supreme Court held that the amending act did not operate retroactively, saying:

"The incident of individual liability attached to and formed a part of the contract as long as it lasted, but its repeal did not deprive the plaintiff of any of the rights secured to him when the contract was made. They still exist, and the remedy to enforce them remains the same. If the corporation itself cannot pay, the members who composed it at the time of the repeal are unaffected by it, and there is nothing in the way of subjecting them to the double liability provision" (22 L. Ed. 548).

In Harrison v. Remington Paper Co., supra, the court said:

"The basis of the stockholders' liability and of the action to enforce it is his contract to pay the debts of the corporation. The Constitution, the statutes under which the corporation is organized, and the established rules of law in force when he becomes a stockholder, are read into and become a part of his contract. By his subscription for the stock, or by his receipt and acceptance of it, he solemnly agrees, in consideration of the benefits derived from its ownership, that he will faithfully perform the obligations and discharge the duties imposed upon a stockholder by the Constitution, the statutes, and the law. When the defendant in this case took his stock, therefore, he made a contract with the Topeka Company and its creditors under the Constitution of Kansas and sections 1200 and 1204, which were then in force, that whenever that corporation suspended business for more than one year he would pay the debts of the corporation which were then existing to an amount not exceeding the par value of his stock. Bank v. Hawkins, 174 U. S. 365, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007; DeWeese v. Smith, 45 C. C. A. 408, 411, 106 Fed. 438, 441; Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed.

587; Anglo-American Land, M. & A. Co. v. Lombard (C. C. A.), 132 Fed, 721, 729.

[fol. 82] "The act of 1899, if applicable to prior contracts, struck down the plaintiff's individual cause of action against the stockholder which accrued upon this contract upon the dissolution of the corporation and left him nothing but a right to a proportionate share with all the other creditors of the amount which a receiver, who could not be appointed until after a judgment and an unsatisfied execution against the corporation, might collect of the stockholder. The Constitution of the United States prohibits the passage by a state of any law which impairs the obligation of a contract (article 1, sec. 10). But counsel for the defendant argue that this act does not violate this inhibition, because it merely effects a harmless substitution of one remedy for another" (140 Fed. 389-90).

The court then reviewed the authorities at some length and summed up as follows:

"A more extended review of the authorities upon this question would not be profitable. A thoughtful consideration of the issue and a careful examination of the decisions have convinced that the true rule, the rule sustained by reason and established by authority, is this: The remedies provided in a state for the enforcement of a contract when it is made are a part of the obligation of the contract. Any repeal or change of any of these remedies which substantially obstructs or retards the enforcement, or lessens the value of the agreement, impairs its obligation, and is unconstitutional and void.. Any repeal or change of remedies which does not substantially diminish the value of the agreement or retard or obstruct its enforcement escapes the inhibition of the Constitution and is valid" (140 Fed. 392).

In Bernheimer v. Converse, supra, the court said:

"It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States (Whitman v. National Bank, 176 U. S. 559, 44 L. Ed. 587,

20 Sup. Ct. Rep. 477), although the obligation is not entirely contractual, and springs primarily from the law creating the obligation (Christopher v. Norwell, 201 U. S. 216, 50 L. Ed. 732, 26 Sup. Ct. Rep. 502).

"Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy, enacting new means of making the liability more effectual? The obligation of this contract binds the stock-[fol. 83] holder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made" (51 L. Ed. 1174).

A State Constitution is a law within the meaning of Section 10 of Article I of the Constitution of the United States.

12 C. J. 988, Sec. 985;
New Orleans etc. Co. v. Louisiana etc. Co., 115 U. S. 650;
State of Louisiana v. Jumel, 107 U. S. 711.

Section 10 of Article I of the Constitution of the United States protects all rights accrued under all contracts, whether written or oral, whether express or implied, whether arising from the stipulation of the parties or accruing from the operation of law.

Lewis v. Breckenridge, 1 Blackf. 220, 12 Am. Dec. 228;
Port of Mobile v. Watson, 116 U. S. 289.

The cases cited in the decision rendered in the case at bar are not in conflict with the positions herein taken, and are not applicable to statutes imposing a contractual liability.

This appears plainly from Moss v. Smith, 171 Cal. 777, which was decided under section 309 of the Civil Code which imposed a penal liability. The court was at great pains in that case to distinguish the penal liability under [fol. 84] C. C. 309 from contractual liability imposed by section 3 of article XII of the State Constitution.

In Moss v. Smith, supra, it is said:

"Nothing in Winchester v. Howard, 136 Cal. 441 (89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77) is in conflict with this; in the first place, because the directors, under section 3, article XII, of the Constitution, which section was the foundation of the action, are liable solely for loss sustained by embezzlement and misappropriation—a liability involving loss and thus entirely different in character from that which appellants contend is imposed by section 309. * * * The right of action against these directors conferred by section 309 was a statutory right pure and simple, having no foundation in contract, nor any existence at common law" (171 Cal. 785-786, 787).

The two other cases principally relied upon in the opinion of the court in the case at bar are Napa, etc., Hospital v. Flaherty, 134 Cal. 315, and Wilcox v. Edwards, 162 Cal. 455.

The rule undertaken to be applied in the opinion in the case at bar is quoted from Napa etc. Hospital v. Flaherty, supra, but that was a case where the statute imposed a liability upon parents and relatives for the support of insane adults, and the persons upon whom the liability was imposed were not in a position to assent or dissent. So the court was quite justified in holding that the right was created "solely by statute and dependent upon the statute alone" (134 Cal. at 317).

In Wilcox v. Edwards, supra, the court dealt with the repeal of the constitutional provision invalidating contracts for the purchase of stocks on margin, and held that the

repeal provision would not be given a retroactive effect; also that the right to sue for the recovery of money paid under a void contract for the purchase of stock, given by the repealed provision, was not quasi contractual in char- [fol. 85] acter, and therefore not a vested right. (See 162 Cal. at 460-463, 468-469).

Dated August 8, 1931.

Respectfully submitted.

J. C. McKinstry, Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Bank of America Bldg., San Francisco, Cal., Attorneys for Appellant. Joseph L. Lewinson, 909 Rowan Bldg., Los Angeles, Cal.; W. H. Douglass, 1010 Pershing Sq. Bldg., Los Angeles, Cal., Amici Curiæ.

[fol. 86] [File endorsement omitted.]

IN SUPREME COURT OF CALIFORNIA. IN BANK

S. F. No. 13939

COOMBES

vs.

FRANKLIN

ORDER DENYING REHEARING—Filed Aug. 21, 1931

By the COURT:

The petition for a rehearing in the above entitled matter is denied. Langdon J. voting for a hearing. Opinion to follow.

Dated August 21, 1931.

Waste, Chief Justice.

[fol. 87] [File endorsement omitted.]

IN SUPREME COURT OF CALIFORNIA. BANK

S. F. No. 13939

PEIRCE COOMBES, Plaintiff and Appellant,

vs.

M. G. FRANKLIN, MILTON E. GETZ, M. O. MEYER, and S. O. MEYER, Defendants; MILTON E. GETZ, Respondent.

OPINION.—Filed Oct. 23, 1931

By the COURT:

A rehearing was sought in this case and denied by this court on August 21, 1931 and this opinion was to follow.

The contention was again made that the decision of the court impairs the obligation of contracts and thereby violates the Constitution of the United States. We are satisfied that it does not and we find nothing in the authorities presented to us to change our conclusion in that regard.

It has, of course, been held in this state that the particular type of directors' liability established by this section of our constitution is contractual in its nature (Dean v. Shingle, 193 Cal. 652). This being so, it undoubtedly entered into and became a part of every contract between the creditors and the corporation as a matter of law. But it is equally true that another section of the California constitution was incorporated by law into such contracts. It is that section which provides broadly for the reserved power over corporation laws, and which reads in part: "All laws now in force in the state concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed." (Cal. Const., Art. XII, sec 1.) A similar provision was contained in the constitution of 1849. See discussion in [fol. 88] Ballantine, California Corporation Laws (1931), p. 7, et seq.

Its effect is, we think, perfectly clear; the repeal of the provision for directors' liability was a contingency which was known at the time the contract was made, and that contingency was as much a part of the contract as was the

liability. Several prior decisions of this court have so interpreted these provisions (Market etc. Co. v. Hellman, 109 Cal. 571; McGowan v. McDonald, 111 Cal. 57; Spring Valley etc. v. San Francisco, 61 Cal. 3; Matter of College etc. Ass'n., 157 Cal. 596).

It is true that the reserved power, however broad, cannot be exercised so as to impair a vested property right (Western Union v. Hopkins, 160 Cal. 106), but the remedy formerly given by the section in question was not such a right, and its repeal did not therefore constitute a denial of due process of law.

[fol. 89] IN SUPREME COURT OF CALIFORNIA

DISSENTING OPINION

I dissent. I think that the reserved power to alter and repeal laws concerning corporations, expressed in Article XII, section 1 of the California constitution, has been given too wide a scope by this decision. I am by no means convinced that in its reference to "laws now in force" and "Laws that may be hereafter passed pursuant to this section" it was intended to apply to another section of the constitution, such as section 3 of Article XII, involved herein. It is true that a self-executing provision of the constitution may have the force and effect of a statutory enactment; but it is not so clear that another provision of a constitution is a law "hereafter passed pursuant" to a prior section.

Furthermore, while the right to alter or repeal such a provision as Article XII, section 3, is undeniable, it does not necessarily follow that a contractual right gained under it falls with the repeal. We have heretofore unequivocally held, and the majority opinion concedes, that the right given to the creditors by said section is a contractual right. When a cause of action based upon it arises, I do not think it is going too far to say that the right is vested, and if so, it becomes entitled to the protection of the due process clause. (See Western Union Telegraph Co. v. Hopkins, 160 Cal. 106.) The analogy of stockholders' liability cannot be ignored, and the cases which have held such liability un-

affected by repeals are very persuasive. (See Harrison v. Remington Paper Co., 140 Fed. 385; Bernheimer v. Converse, 206 U. S. 516; Thompson on Corporations (3rd Ed.) pp. 462, 465.)

The order dismissing the appeal was, in my judgment, erroneous.

Langdon, J.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 11, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted, and the case is advanced and assigned for argument on Tuesday, February 23rd next after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.